85-1384

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM R. TURNER; KATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JAMES PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY,
Employees of the Department of Corrections and Human Resources for the State of Missouri
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
Respondent.

DR. LEE ROY BLACK; DAVID W. BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT,
Employees of the Department of Corrections and Human Resources for the State of Missouri
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Appeals Court for the Eighth Circuit incorrectly applied the "least restrictive alternative test" to their analysis and assessment of the Missouri Department of Corrections and Human Resources' (A): regulation of inmate to inmate correspondence which did not permit correspondence between inmates without prior approval of their classification team, and (B): of inmate marriages which did not permit inmates to marry without presenting the institutional head with a "compelling reason" for the marriage in that the use of the standard of strict scrutiny of the "least restrictive alternative" test enunciated in *Procunier* v. *Martinez*, 416 U.S. 396 (1974) rather than the "rational relation" test of *Jones* v. *North Carolina Prisoner's Union, Inc.*, 433 U.S. 119 (1977) was an improper application of the law?

2. Whether the findings of facts in a case which declared two regulations affecting over 8,000 inmates to be unconstitutional were sufficient in that they failed to find anything more than occasional instances of arguably unconstitutional conduct and did not find any pattern or practice of constitutional abuse committed by the officials of the Missouri Department of Corrections and Human Resources?

LIST OF ALL PARTIES

1. Petitioners', who were appellants and defendants below, are various employees of the Missouri Department of Corrections and Human Resources.

William L. Webster
Attorney General
Michael L. Boicourt, Chief Counsel
Special Litigation Division
Henry T. Herschel
Assistant Attorney General of Counsel

2. Respondents' who were appellees and plaintiffs below, are Leonard Safley and Mary Webb, individually and as a class of similarly situated people.

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Kansas City, Missouri 64108

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, but is designated by the numbers 84-1827 and 84-2337; it appears in Appendix A attached hereto. The opinions of the United States District Court for the Western District of Missouri; a memorandum and order, as reported at *Safley, et al.* v. *Turner, et al.*, 586 F.Supp. 589 (W.D. Mo. 1984), was filed on May 7, 1984; it appears in Appendix B attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court decision declaring the petitioners regulations concerning correspondence and marriage unconstitutional pursuant to 42 U.S.C. § 1983. Pursuant to Title 28, U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed within ninety (90) days of the entry of this judgment, on or before February 18, 1986. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

The respondents initiated this lawsuit by filing a complaint for damages in the Western District of Missouri. An attorney was appointed and later, after the District Court consolidated a damage action numbered 81-0891 and an injunctive action numbered 82-0022, the District Court permitted the respondents to amend their complaint on October 5, 1983 and be certified as a class pursuant to Rule 23(b)(2), F.R.Civ. P.[1] A trial, without jury, was held lasting for a five day period during February, 1984. On May 7, 1984, the District Court filed its "Memorandum, Opinion and Order". The Dis-

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[1]The class is made up of the following persons:

A. Persons who either are or may be confined to the Renz Correctional Center and who desire to correspond with inmates at other Missouri correctional facilities or persons outside of the Missouri Division of Corrections.

B. Persons who desire to correspond with inmates of any Missouri correctional institution whose correspondence with inmates of Missouri correctional institutions has been stopped or delayed for any reason other than an attempt to violate the extant rules of the Missouri Division of Corrections concerning correspondence.

C. Persons who desire to visit or marry inmates of Missouri correctional institutions and whose rights of correspondent visitation, or marriage have been or will be violated by employees of the Missouri Division of Corrections.

trict Court, the Honorable Howard F. Sachs presiding, held that the Missouri Department of Corrections and Human Resources' (hereafter referred to as the petifioners) regulation which required inmates to provide prison officials with a compelling reason before permission would be given for their marriage was an unnecessary infringement upon the fundamental privacy interests of the marital relationship. *Safley* v. *Turner,* 586 F.Supp. 589, 594 (W.D. Mo. 1984) The District Court found that the prison officials had not borne their burden of proof in failing to present a pattern of security or rehabilitative concerns which warranted the regulation when there was a less restrictive alternative available in the form of "counseling" by the superintendent. *Id.* at 594. In a similar vein, the District Court found that petitioners' regulations which did not permit correspondence between inmates in separate institutions within and outside the State of Missouri without the prior approval of the prisoner's classification team was an infringement on the inmates First Amendment rights as enunciated under *Procunier* v. *Martinez,* 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974). *Safley* v. *Turner, supra,* 586 F.Supp. at 595. The District Court held that a less restrictive alternative which would require the prison officials to review each piece of correspondence between inmates was a security measure which was sufficient to protect the institution and its inhabitants from danger. *Id.* at 596.

The District Court also found the petitioner's rule prohibiting former inmates from visiting inmates in prisons until after they have been in a non-prison setting for more than six months to be a legitimate exercise of discretion and denied the respondent's claim for damages because all the issues presented were sufficiently "novel or unsettled" so that a "good faith defense" could be recognized. *Id.* at 596-97.

Notice of appeal was filed by the petitioners and briefs were submitted to the Appeals Court of the Eighth Circuit.

The respondents did not seek to appeal the decision of the District Court.

On appeal, in an opinion filed November 19, 1985, the United States Court of Appeals for the Eighth Circuit affirmed that portion of the District Court order finding that the challenged marriage and correspondence regulations were inconsistent with constitutional prohibitions against interference with the First Amendment and privacy rights implied in the Fourteenth Amendment to the United States Constitution. Appendix A-12, 16. The Circuit Court, in its discussion of the correspondence rule, affirmed the District Court's application of the standard of strict scrutiny announced by this Court in *Procunier* v. *Martinez, supra,* on the basis that First Amendment speech rights were directly implicated and ultimately were deprived by the enforcement of the regulations in the instant case. Appendix A, p. 7-8. Further, the Circuit Court found there was no showing that the exchange of mail between inmates in different institutions was "inherently dangerous" enough to merit the application of the rational relation test enuciated in *Jones* v. *North Carolina Prisoners Labor Union, Inc.,* 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) and *Bell* v. *Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Appendix A. p. 9.

In a similar analysis, the Circuit Court found that the petitioner's regulations governing the application by inmates permission to be married was an unconstitutional infringement of fundamental privacy rights of inmates. Appendix A-13. As with its decision concerning the correspondence rule, the Circuit Court found that since marriage was a fundamental right and the regulation absolutely prohibited some inmates from getting married, a standard of "strict scrutiny" was the appropriate rule of law to be applied to the facts of the case. Appendix A-16. The Circuit Court could not find any state interest important enough to sustain the petitioner's regulation.

Finally, the court found that District Court's findings of fact were not clearly erroneous and did not proceed from an erroneous theory or conception of the law. Appendix A-17.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The basis for the United States District Court's jurisdiction in this case was Title 28 U.S.C. §§ 1331 and 1343.

ARGUMENT

The Eighth Circuit Court of Appeals found that it was unnecessary to determine whether the correspondence regulation promulgated by the Missouri Department of Corrections and Human Resources was rationally related to the legitimate goals of security, rehabilitation, and the maintenance of the internal order of the institution in accordance with this Court's rulings in *Jones* v. *North Carolina Prisoners Labor Union, Inc., supra; Bell* v. *Wolfish, supra;* and *Pell* v. *Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), because the correspondence regulation was not a "time, place or manner" regulation. They held that the two prong strict scrutiny test employed by this Court in *United States* v. *Grace,* ___ U.S. ___ 103 S.Ct. 1702, 1907 (1983); and *Procunier* v. *Martinez,* 416 U.S. 396 (1974) was the appropriate standard to be applied to the case at bar. Appendix A-8-9. In a similar manner, the court found both of the regulations regarding marriage promulgated by the petitioners to be unconstitutional because the marriage decision itself was a fundamental right distinct from, "but equally as important" as the decision relating to other family matters. Again, the court found that the strict scrutiny test of *Procunier* v. *Martinez, supra,* was the appropriate test to be applied in the situation because the regulation was not a "time, place or manner" regulation, and no alternative methods of exercising the right were available. Appendix A-15-16.

The courts below reached their decision concerning the correspondence regulation in spite of evidence from the petitioners and one expert in the administration of correctional institutions who testified that it would be impossible to monitor all inmate mail and that it was imperative that the correctional officials be permitted to limit correspondence to those inmates they trusted in the interests of maintaining prison security and the rehabilitation of inmates. The Court below did not recognize that inmate to inmate correspon-

dence has many of the characteristics of the "inherently dangerous" problems in the association of prisoners noted by this Court in *Jones* v. *North Carolina Prisoners Labor Union, Inc., supra,* 433 U.S. at 132-133.

In regards to the marriage issue, the Circuit Court did not recognize that inmate marriages, especially to another inmate, are usually not beneficial to the rehabilitative process and can be a threat to the security of an institution. Furthermore, there was evidence that the superintendent of the institution was concerned that the creation of "love triangles" would increase the danger of violent confrontation. This is especially important since the Renz Correctional Institution is a unique institution. Not only does it hold maximum, medium and minimum security inmates of both sexes, but the prison is surrounded by a minimum security perimeter.

Since the Circuit Court applied the least restrictive alternative test of *Procunier* v. *Martinez, supra,* it required that the petitioner present a pattern of security concerns which would justify not employing the least restrictive alternative of reviewing each piece of correspondence which would be sent between inmates or counseling each inmate concerning his or her marriage. By requiring the prison officials to produce more than "sincerely held beliefs" into evidence, they violated this Court's admonition that it was the inmates' burden t, prove that the prison officials were not conclusively wrong in their belief that certain regulations were necessary to obtain certain penological goals. *Jones* v. *North Carolina Labor Union, Inc., supra,* 97 U.S. at 132-133.

I.

Correspondence Rule

In the present case, it is submitted that the court below erred in the application of the least restrictive alternative standard to the review of the petitioners' correspondence rule.

The Court below attempted to limit this Court's analysis and the standards as applied in *Jones* v. *North Carolina Prisoners Union, Inc,. supra, Bell* v. *Wolfish, supra,* and *Pell* v. *Procunier, supra,* (hereafter referred to as the rational relation test) to only those activities which were "inherently dangerous" and were "inconsistent with the fact of incarceration".

This type of analysis necessarily shifts the burden of proof from inmates to prison officials, skews the theory and violates the spirit of this Court's analysis of inmates' rights in a prison setting. Fundamentally, it was error not to analyze the petitioners' regulation on the basis of whether the regulations were rationally related to legitimate penological goals. Once established that the regulation is rationally related to a proper penological goal, the burden should have shifted to the inmates to demonstrate that the prison officials had substantially exaggerated their response to these concerns. *Bell* v. *Wolfish, supra,* 441 U.S. at 540-541, n.23. The Circuit Court found that the exchange of correspondence between inmates, communication among inmates, was not in that area of activities which was of a "special danger inherent in the concerted action of inmates". The court further emphasized that the prison regulations approved by this Court in *Jones* v. *North Carolina Prisoner's Union, Inc., supra; Bell* v. *Wolfish, supra;* and *Pell* v. *Procunier, supra,* were "time, place or manner" regulations and were "content neutral".

The important aspects of a "time, place and manner" regulation is that it does not restrict the content of the speech and that it fairly permits the activity at a particular place and at a particular time. It was noted by Justice Marshall in *Grayned* v. *City of Rockford,* 408 U.S. 104, 115-117, 92 S.Ct. 2294, 2303-2304, 33 L.Ed.2d 222 (1972) that:

> [G]overnment has no power to restrict [speech] activity because of its message . . . [but] reasonable 'time,

place and manner' regulations may be necessary to further significant governmental interests, and are permitted. For example, two parades cannot march on the same street simultaneously and government may allow only one. [citations omitted] A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. [citations omitted] If overamplified loud speakers assault the citizenry, government may turn them down. [citations omitted]

* * *

The nature of the place, 'the pattern of its normal activities, dictates the kinds of regulations of time, place and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.* Our cases make clear that in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. "Access to [public places] for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly". [Emphasis added.]

See also; *Effron* v. *Intern Soc. for Krishna Consciousness*, 452 U.S. 640, 648, 101 S.Ct. 2559, 2564, 69 L.Ed.2d (1981).

It is submitted that the Circuit Court below erred because it did not review the exercise of the prisoners' rights in light of the forum in which it was to be exercised. This exercise of the right to communicate was not performed in a public place and did not involve free citizens of the world. The petitioners'

regulation was solely aimed at the restriction of the exercise of communication between lawfully incarcerated inmates at different prisons. The regulation was "content neutral" because once communication was approved between inmates, their correspondence was not censored or otherwise regulated.

Although prisoners do not lose all their rights when they are incarcerated, the fact of incarceration limits the exercise of most of the rights that non-inmates take for granted. *Jones* v. *North Carolina Prisoners Union, Inc., supra*, 433 U.S. at 125-126. Voting, travel, religious observance, speech, marriage and communication are limited by the operational realities and the legitimate penological interests of the prison. This is not to propose that the analysis is limited merely to the type of individual involved, but it is important to note that who individuals are, where they are located, and what they are capable of doing plays a substantial and important part in weighing the various factors when applying a regulation which can justifiably restrict the exercise of a constitutional right. It is in support of this view that Justice Stewart noted in *Pell* v. *Procunier, supra*:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restrictions on personal communication among members of the general public. We recognize, however, that '[t]he relationship of state prisoners and state officers who supervise their confinement is far more intimate than that of state and private citizens' and that the internal problems of state prisoners involve issues particularly within the state's authority and expertise.

Pell v. *Procunier, supra*, 417 U.S. at 825-826; *See also Wolf* v. *McDonnell*, 418 U.S. 539, 575-576, 94 S.Ct. 2963, 2984, 41 L.Ed.2d 935 (1974). The regulation in the present case was not intended to prohibit all correspondence between inmates; it required only that the inmate obtain prior approval before

corresponding with other inmates in other institutions. The least restrictive alternative to this regulation, as found by the Circuit Court, was for the prison official to review each piece of mail between inmates. As the testimony at the trial indicated, state officials did not believe that it was possible to review each piece of mail and felt that such a regulation would leave them open for the transfer of information detrimental to the operation of the prison and the protection of inmates and staff.

The Circuit Court below contended that it was only activities engaged in by prisoners which were "inherently dangerous" which should be afforded the deference of the rational relation test enunciated in *Jones* v. *North Carolina Prisoners Union, Inc., supra, Bell* v. *Wolfish, supra,* and *Pell* v. *Procunier, supra.* This is a surprising assertion in light of the deference which is required to be given to the decision of prison officials regarding the maintenance of internal order at a prison. *Jones* v. *North Carolina Labor Union, Inc., supra.* 433 U.S. at 125-126. Nor is the characterization of "inherently dangerous" activities is sufficiently clear to provide prison officials with sufficient notice to provide reasonable direction in the drafting of regulations. The Circuit Court's analysis and definition of "inherently dangerous" also is not based on the operational realities of a prison. Prisons, because of their structural identity and in the complexion of their population, differ from one and another in a myriad of ways. The prison at issue in this case is a co-correctional institution, housing maximum, medium, and minimum security prisoners.[2] What could be characterized as dangerous at one of the petitioners' institution could not always be

[2]Maximum and medium security level women were housed at Renz Correctional Center, and minimum security men were housed at Renz. The institution, at that time, also housed prisoners who were being "hidden" from enemies within the correctional system.

considered dangerous at another institution. The court below noted that concerted group activity among inmates was an "inherently dangerous" activity, but that "mere communication" between prisoners in different institutions was not as dangerous an activity. The essence of the danger of group activity inside a prison is the communication between, and the coordination of, inmates' action. Group activities, such as riots, gang or revenge killings, and escapes are just as serious, if not more serious, when the efforts are coordinated between more than one prison. The fact that inmates are separated by many miles is small solace to a director of a system when problems break out simultaneously in different prisons. The primary tenet of the control of concerted group activity within a prison system is to break up the group or separate leaders. Since communication between the prisons is now permitted, that solution is impossible in the Missouri prison system.

The Circuit Court also was extremely concerned that there was no alternative avenue of communication for these inmates. Initially, as pointed out repeatedly, this regulation does not cut off communication between inmates. Even by its strictest interpretation, the regulation only restricts the communication between inmates. The press, civilians, inmates who have been released for more than six months, and relatives of inmates who are incarcerated are permitted to correspond with inmates on the inside of the prison.

The use of the "least restrictive alternative test" also unfairly shifted the burden of proof from the prisoners to the petitioners to prove by substantial evidence that the prison officials exaggerated their response to the security considerations involved; and to the prison officials to prove a pattern of security concerns. *Bell* v. *Wolfish, supra,* 441 U.S., at 540-541, n. 23. This switch in the burden of proof is in conflict with this Court's principles and even with the Eighth Circuit's own guidance in the area. *Jones* v. *North Carolina*

Prisoners Union, Inc., supra, 433 U.S. at 127-128; *Rogers* v. *Scurr,* 676 F.2d 1211, 1215 (8th Cir. 1982); *Otey* v. *Best,* 680 F.2d 1231, 1233 (8th Cir. 1982). Using the two prong test of *Procunier* v. *Martinez, supra,* prison officials are left with the nearly impossible task of attempting to demonstrate to a court that the least restrictive alternative would not work as well as the regulation already in place. In the present case, if the regulation is working, it is difficult for prison officials to produce evidence of what bad results would occur if the regulations were found to be unconstitutional. If the prison officials cannot produce bodies, they are crying wolf; if they can, they have failed in their duty to protect their charges. Prison officials have to be able to anticipate trouble; if they can only react to it, they will eventually fail. Failure in the business of prison administration is usually more tragic than failure in other human endeavors. See *Jones* v. *North Carolina Labor Union, Inc., supra.* It is also a high price to pay for experimentation in theoretical prison management.

Furthermore, a Writ of Certiorari should issue in this case because there is a need for guidance to the lower courts in reviewing prison regulations governing communication between inmates. During this period of rising gang violence (a trend which the State of Missouri has not avoided), it is important that this Court lay careful and clear guidelines on how far prison officials may go in drafting regulations which can restrict communication between inmates to protect other inmates and the staff of an institution. To be able to do this, prison officials need to know which standard is to be applied when dealing with issues that affect purely inmate to inmate relations. At present there have been some differences in the lower courts concerning whether a strict scrutiny test or a rational relations test should be applied, and whether the control of inmate-to-inmate communication is a compelling

state interest and thus, would survive scrutiny under either or both standards.[3]

II.

The Marriage Rule.

In the Circuit Court, two regulations concerning marriages within the Missouri Department of Corrections and Human Resources were at issue. Prior to December 1, 1983, the "old rule" set out procedures to be followed when an inmate desired to get married. That rule had no explicit provision permitting a superintendent to deny a request to be married; however, Superintendent Turner testified that he had the inherent power to control his institution. After December 1, 1983, a new marriage regulation was promulgated. Under this rule, an inmate desiring to marry had to file a written request stating the reasons for the marriage, and the superintendent was given the explicit authority to approve the request when there were "compelling reasons" to do so. On its face the rule applied to both inmates and outsiders, but it became clear at the trial that the regulation was intended to apply primarily to inmate-to-inmate marriage.

The court below, relying on *Zablocki* v. *Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), held that marriage, even without cohabitation, sexual intercourse, and the begetting and the raising of children, was a fundamental right, and the

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[3]*Cases Favoring Stricter Scrutiny and Least Restrictive Alternative Test: Abdul Wali* v. *Coughlin,* 754 F.2d 1015 (2nd Cir. 1985); *Bradbury* v. *Wainwright,* 718 F.2d 1538 (11th Cir. 1983); *Watts* v. *Brewer,* 588 F.2d 646 (8th Cir. 1978).

Cases Favoring Deference and Rational Relations Test: Pittman v. *Hutto,* 594 F.2d 407 (4th Cir. 1979); *Rogers* v. *Scurr,* 676 F.2d 1211 (8th Cir. 1982); *Otey* v. *Best,* 680 F.2d 1231 (8th Cir. 1982); *St. Claire* v. *Cuyler,* 634 F.2d 198 (2d Cir. 1980); *Expedito* v. *Leddy,* 618 F.Supp. 1362 (E.D. Ill. 1985); *Fowler* v. *Graham,* 478 F.Supp. 90 (D.S. 1979); *Mitchel* v. *Carson,* 404 F.Supp. 1220 (D. Kan. 1975); *Lawrence* v. *Davis,* 401 F.Supp. 1203 (W.D. Va 1975).

restrictions on the right required the strict scrutiny test in *Procunier* v. *Martinez, supra*. They held that this test applied, as with the correspondence rule, and that the petitioners' regulation did not involve the regulation of a "time, place or manner" by which a marriage could take place, but rather deprived the inmates of any right to be married. Furthermore, the regulation did not provide the inmates with any alternative way of exercising their desire to marry.

As with the correspondence issue, the petitioners would argue that the court erred below because it used an incorrect legal standard when it applied the least restrictive alternative test. It failed to assess the appropriate burden of proof on the parties and therefore failed to give the appropriate difference to the regulations and to the discretion of the correctional officials.

The court below seemed influenced by the fact that the marriage regulations required a "compelling reason" for marriage. They found that this somehow deprived, rather than limited, the inmates of the exercise of their privacy rights under the Fourteenth Amendment. Although, as conceded, the prison officials do not believe that it is in the best rehabilitative interest in most cases to permit inmates to marry other inmates, that is not to say this regulation is an absolute ban against the marriage of inmates.

The exercise of fundamental rights, like all other rights, has to be limited by the fact of incarceration. The *Martinez* strict scrutiny standard should not be imposed just because a prison regulation would limit a person, however severely, in the exercise of a right. It is important to note that "time, place and manner" regulations must be tailored to the forum in which they function. In the present case, the drafters of the regulations are dealing with inmates, women who have made some seriously detrimental choices in life some of which involved men, who should not necessarily be permitted to make the same mistakes over and over again. It was noted

by the District Court, and it is assumed it was ageeed with by the Circuit Court, that inmates should be permitted to make their own mistakes. That probably highlights the difference between the legal positions of petitioners and the respondents in this case. Neither of the courts below noted any evil motives on the part of the superintendent of the institution. In fact, his sin was "p[illegible]nalism". *Safley* v. *Turner et al., supra*, 586 F.Supp at 597. The petitioners can not permit these inmates to make mistakes again and again and fulfill its duty to rehabilitate and protect its charges. At least while they are incarcerated, inmates should not be permitted to make choices that would militate against their rehabilitation, especially if those choices are, in substance, empty ones.

The court below made much of the fact that this Court in *Zablocki* v. *Redhail, supra*, in an opinion delivered by Justice Marshall, found that the decision to marry, standing alone, was protected by the right to privacy implicit in the Fourteenth Amendment's Due Process Clause. 98 U.S. at 386. Frankly, no one has ever disputed whether the right to marry was or was not a fundamental right. What remains disputed is whether the petitioners have to take on the administrative burdens implicit in having incarcerated inmates marry or remarry. The question is whether the prison officials have the right to substitute their judgment for that of inmates who are incarcerated. The court below did deem this to be an area that invoked the lenient scrutiny of an "inherently dangerous" activity even though there was testimony that the prison officials considered that love triangles threatened the safety of the institution and other inmates.

In the same sense as with the correspondence rule, the Circuit Court's analysis misapplies this Court's principles found in *Jones* v. *North Carolina Prisoners' Union, Inc., supra; Bell* v. *Wolfish, supra*, and *Pell* v. *Procunier, supra*, by relying on the stricter two-prong scrutiny test found in *Procunier* v. *Martinez, supra*. This reliance inherently skews the

analysis and does not permit the appropriate guidance to state officials.

In addition, until relatively recently, it was thought that a prisoner had no right to have a marriage ceremony performed in prison. At present, there is confusion on the applicable standards to be applied and limitations permissible on inmate marriages.[4]

The petitioners believe that the Circuit Court simply misconstrued and misinterpreted the requirements of the rational test. Should a writ of certiorari issue, the petitioners intend to address the actual requirements for the application of the rational relations test.

III.

Findings of Fact

Finally, it is the petitioners' position that the Courts below were clearly erroneous in that a number of the District Court's finding of facts were not supported by evidence legally sufficient to substantiate the findings of facts. The petitioners will also argue that the Court had an erroneous conception of the applicable law. Frankly, in this case, the Court repeatedly made some findings of fact that amounted to, at worst, conclusions that might state a cause of action for damages, but were not sufficient upon which to base a department-wide injunction. Occasions, or instances of certain conduct, even unconstitutional conduct, should not be the

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[4]*Inmate Marriages Permitted: Bradbury* v. *Wainwright*, 718 F.2d 1538 (11th Cir. 1983); *Lockhart* v. *Faulkner*, 574 F.Supp. 606 (N.D. Ind. 1983); *Salisbury* v. *List*, 501 F.Supp. 105 (Nev. 1980).

Inmate Marriages Regulations Upheld: Hudson v. *Rhodes*, 579 F.2d 46 (6th Cir. 1978) (per curiam); *Wool* v. *Hogan*, 505 F.Supp. 928 (D. Vt. 1981); *Polmaskitch* v. *U.S.*, 436 F.Supp. 527, (W.D. Ok. 1977); *Johnson* v. *Rockerfeller*, 365 F.Supp. 377, (SD NY 1973), affirmed MEM.SUB.NOM.; *Butler* v. *Wilson*, 415 U.S. 958, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1973); *In re Golen*, 512 Pac.2d 1028 (Utah 1973), *cert. denied*, 414 U.S. 1128 (1979).

basis for striking down department-wide regulations. At the very least, the District Court should be required to make a find of a pattern or practice of unconstitutional behavior.

It is important that this Court guide the Circuit Courts in the appropriate standards to apply when determining whether a regulation is unconstitutionally infirm.

CONCLUSIONS

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1827

Leonard Safley, et al.,

Appellees,

v.

William R. Turner; Kathy Crocker; Earl Engelbrecht; Betty Bowen; Bernice E. Trickey; Howard Wilkins; James Purkett; William F. Yeager, Larry Trickey,

Appellants.

No. 84-2337

Leonard Safley, et al.,

Appellees,

v.

David W. Blackwell; Lee Roy Black; Donald Wyrick; Betty Bowen; Earl Engelbrecht,

Appellants.

Appeals from the United States District Court for the Western District of Missouri.

Submitted: June 13, 1985
Filed: November 19, 1985

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and NICHOL,* Senior District Judge.

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*The HONORABLE FRED J. NICHOL, Senior United States District Judge for the District of South Dakota, sitting by designation.

NICHOL, Senior District Judge.

This is an appeal from a class action in which the district court[1] declared unconstitutional certain regulations of the Missouri prison system. For reversal, appellants argue that the district court applied the incorrect legal standard in determining the constitutionality of the prison rules, and that the district court's findings of fact were clearly erroneous. For the reasons set forth below, we affirm.

BACKGROUND

The challenged regulations were in effect at all institutions within the Missouri Division of Corrections. However, the focus of inquiry at trial was the Renz Correctional Institution (Renz). Renz was originally designed as a minimum security prison farm employing male inmate labor. As such, it has a minimum security perimeter without the usual maximum security elements such as guard towers and walls. Since the late 1970s, Renz has become what is known as a "complex prison"—that is, its population consists of both male and female inmates of varying security levels. Most of the female inmates at Renz are medium and maximum security level offenders, while most of the male inmates are classified as minimum security.

Two regulations are at issue in this appeal. The first dealt with mail between inmates in different institutions within the state, and was set out in Division of Corrections regulation 20-118.010(1)(e):

> Correspondence with immediate family members who are inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/treatment team of each inmate deems it in the best interest of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

[1]The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

The challenged portion of the rule was that part permitting mail between non-family members only at the discretion of the classification/treatment team of each inmate involved.[2] The team used psychological reports, conduct violations, and progress reports contained in each inmate's file to decide whether to permit correspondence. The testimony indicated that these materials were not actually consulted on each occasion since the team was familiar with the classification files of most of the inmates. Thus, inmate-to-inmate correspondence was controlled by prior approval or disapproval of particular inmates rather than individual review of each piece of mail.

The district court found in Finding of Fact number 5 that

> [t]here have been instances where the divisional correspondence regulation has been violated. For example:
>
> a. Letters have been stopped without notice or explanation to either the correspondent or the recipient;[3]
> b. Mail to and from persons not incarcerated has been stopped or refused on factually incorrect grounds or without legitimate justification;[4]

[2]At Renz, this team consisted of three persons—a case-worker, Betty Bowen; a classification assistant, Warren Karander; and the particular inmate in question. Each member of the team had an equal vote. Tr., Vol. I at 87-89.

[3]Division of Corrections regulations 20-118.010(1)(C) and (2)(C) provide for notification to the sender and addressee when mail containing contraband is confiscated.

[4]The regulation places no restrictions on mail to and from non-inmates except for the prohibition against contraband, escape plots, and the like.

c. Mail to incarcerated family members has been refused or returned without notification or explanation;[5]

d. Mail with former inmates has been refused or returned without notification or explanation.[6]

Safley v. *Turner*, 586 F.Supp. 589, 591 (W.D. Mo. 1984). Moreover, "the rule as practiced [at Renz] is that inmates may not write non-family inmates." *Id.* This practice was set forth in the Renz Inmate Orientation Booklet presented to each inmate upon arrival at Renz. The district court found that correspondence had been denied between married inmates, and between inmates who desired to maintain a friendship. An unwritten rule at Renz required prior approval of inmate-to-inmate legal mail; absent such approval, this mail was routinely opened, stopped and refused despite the divisional regulation stating that such mail "will be permitted." The reasons given for these practices include interception of plans for escape, heading off riots and other disturbances, and controlling the formation and activities of inmate gangs. These matters are of special concern at Renz because of the minimum security perimeter.

The second rule at issue in this appeal involved inmate marriages. Prior to December of 1983, the Missouri prison system operated under divisional regulation 20-117.050, which set out the procedure to be followed when an inmate wished to marry. As the district court noted, this regulation "(a) did not obligate the Missouri Division of Correction to assist an inmate who wanted to get married, but (b) did not authorize

[5]Regulation 20-118.010(1)(E) provides that inmate correspondence with incarcerated family members "will be permitted." Presumably, the prohibition against contraband and the provisions for notice of confiscation apply to family as well as non-family mail.

[6]*See* note 3, *supra*.

the superintendents of the various institutions to prohibit inmates from getting married. Inmates at Renz were, however, frequently denied permission to be married." *Safley*, 586 F.Supp. at 592. On December 1, 1983, after this lawsuit was filed, a new inmate marriage regulation was promulgated providing that "[t]he superintendent may approve the marriage of an inmate when requested when there are compelling reasons to do so." Appellants' Brief, App. E. The burden was on the inmate to provide a compelling reason for the marriage. The term "compelling" was not defined in the regulation. At trial, however, testimony of prison officials indicated that only a pregnancy or the birth of an illegitimate child would be considered compelling reasons.

The district court found that the marriage restrictions were imposed largely on female inmates at Renz and at the Chillicothe Correctional Center for Women, and that the restrictions were motivated primarily by protective attitudes. Apparently many of the female inmates who were denied permission to marry had come from situations involving domestic abuse. Renz's Superintendent Turner believed "that women prisoners whose crimes were connected to abuse that they had suffered . . . needed to concentrate on developing skills of self-reliance." Appellants' Brief at 30. Turner believed it to be in the best rehabilitative interests of the inmates to avoid any personal relationship with another inmate. Security interests were also cited. Appellants contend that "the friction that is caused as a result of a 'love triangle' and the maintenance of 'wholesome' inmate friendships is the basis for a large amount of violence within the prison system." *Id.* at 47-48.

The district court, relying on *Procunier* v. *Martinez*, 416 U.S. 396 (1974), applied a traditional strict scrutiny standard. The court held the marriage rule to be an unconstitutional infringement upon the fundamental right to marry because it was far more restrictive than was either reasonable or essen-

tial for the protection of the state's interests in security and rehabilitation. *Safley,* 586 F.Supp. at 594. Likewise, the mail rule was unnecessarily broad, thus constituting a violation of the inmates' First Amendment rights. *Id.* at 596. The district court also held that the correspondence regulations had been applied in an arbitrary and capricious manner.

THE CORRESPONDENCE RULE

Appellants argue that, because of the plaintiff's status as prisoners, the district court should have applied a rational basis or reasonableness test rather than strict scrutiny in determining the constitutionality of the restriction on inmate-to-inmate correspondence. The issue is one of first impression in this circuit; in fact, we have found only one other decision addressing the precise question of mail between inmates of different institutions. *See Schlobohm* v. *U.S. Attorney General,* 479 F.Supp. 401 (M.D. Pa. 1979) (applying strict scrutiny and finding the regulation constitutional). A series of Supreme Court cases, however, as well as a number of our past decisions concerning First Amendment rights of prisoners may provide guidance.

We begin with the observation that, traditionally, a direct governmental prohibition of the right to free speech is permissible only if the restriction furthers a compelling governmental interest and is the least restrictive alternative for achieving that purpose. *United States* v. *Grace,* ___ U.S. ___, 103 S.Ct. 1702, 1707 (1983); *Perry Education Association* v. *Perry Local Educators' Association,* ___ U.S. ___, 103 S.Ct. 948, 955 (1983). Restrictions on the First Amendment rights of prisoners, however, have presented special problems. "[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Martinez,* 416 U.S. at 405. Yet the duty of the federal courts to protect fundamental constitutional guarantees, even in state penal institutions, remains intact. *Id.* Hence, courts have

struggled to discern the faint line between appropriate deference to prison administrators, on the one hand, and discharge of the judicial duty, on the other.

In *Martinez,* the Supreme Court considered a prisoner mail censorship regulation which proscribed certain forms of expression in inmate correspondence.[7] The Court determined that, because the regulation applied to mail to and from non-inmates as well as inmates, the case did not require an assessment of the extent to which prisoners may claim First Amendment freedoms but instead could be decided on the basis of incidental restrictions on the rights of members of the general public. *Martinez,* 416 U.S. at 408-09. In this light, the Court held that censorship of prisoner mail is justified only if it furthers an important or substantial governmental interest unrelated to the suppression of expression, and the limitation is no greater than necessary or essential to protect that interest. *Id.* at 412. Under this standard, the regulation in *Martinez* was unconstitutional.

Later in the same Term the Court decided *Pell* v. *Procunier,* 417 U.S. 817 (1974), which involved, *inter alia,* a challenge to a prohibition against face-to-face visits between prisoners and news reporters. Because the rule restricted only one manner of communication between inmates and the general public, *id.* at 823, it was regarded as a "time, place or manner" regulation. *Id.* at 826; *see, e.g., Grayned* v. *City of Rockford,* 408 U.S. 104 (1972). The regulation was upheld because it met the traditional "time, place or manner" test. It furthered the important governmental interests in deterrence, security and rehabilitation; it was content-neutral in that it

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[7]Inmates could not write letters in which they "unduly complain," "magnify grievances," or express "inflammatory political, racial, religious or other views or beliefs," nor could they send or receive letters that "pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate." *Martinez,* 416 U.S. at 399-400.

was applied equally to all reporters and prisoners; and, most significantly, several alternative means of communicating with the public, including with reporters, were available to the prisoners. *Pell,* 417 U.S. at 824-25.

In the case at bar, we do not deal with a "time, place or manner" regulation. The challenged mail rule, both on its face and as applied, purports to eliminate all manner of correspondence between inmates not "approved" by the classification/treatment team. Nevertheless, *Martinez* and *Pell* are useful illustrations of the proposition that, although lawful incarceration " 'brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," . . . a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penalogical objectives of the corrections system." *Pell,* 417 U.S. at 822 (citations omitted); *see also Martinez,* 416 U.S. at 422 (Marshall, J., concurring). Implicitly, then, those rights which are not inconsistent with the fact of incarceration or with legitimate penological (sic) objectives retain the highest level of protection afforded by the First Amendment, and their deprivation requires strict scrutiny by the courts. Thus, we must decide whether the right to exchange letters between inmates of different institutions in inconsistent with either of those considerations.

Appellants rely most heavily on two of the Court's more recent decisions. In *Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977), prison regulations prohibited inmates from soliciting other inmates to join the Union, barred all meetings of the Union, and prevented the delivery of packets of Union publications that had been mailed in bulk to several inmates for redistribution among other prisoners. The Court upheld the regulations because they were "reasonable, and [were] consistent with the inmates' status as prisoners and with the legitimate operational considera-

tions of the institution." *Id.* at 130. However, the Court made clear that First Amendment free speech rights were "barely implicated." *Id.* The only real loss was that of the cost advantages of bulk mailings; individual mailings of Union material were not banned. *Id.* at 130 n. 8.

First Amendment associational rights, the *Jones* court acknowledged, were more directly implicated but were still subject to a reasonableness standard. *Id.* at 132. This was a reflection of the Court's concern with the special dangers inherent in concerted group activity by prisoners.[8] The Court noted the "ever-present potential for violent confrontation and conflagration" among inmates, and the fact that "a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." *Id.* at 132-33.

Unlike in *Jones,* First Amendment speech rights are directly implicated in the instant case. The right to exchange letters with another is clearly a fundamental free speech value. And the presumption of dangerousness applied by the *Jones* Court to prisoner unions loses its force in the context of mail between two inmates in two different institutions physically separated by many miles.

The other case relied upon by appellants is *Bell* v. *Wolfish,* 441 U.S. 520 (1979). There, a group of pretrial detainees contended, *inter alia,* that a regulation prohibiting the receipt of hardback books not mailed directly from publishers, book clubs, or bookstores violated the First Amendment. The receipt of paperback books, magazines, and other soft-covered materials from any source was permitted. The Court upheld the regulation, concluding it was a rational

[8]For a thorough discussion of *Jones* and other decisions pertinent to this issue, *see Abdul Wali* v. *Coughlin,* 754 F.2d 1015, 1029-33 (2d Cir. 1985).

response to an obvious security problem. *Id.* at 550. "It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings." *Id.* at 551. There was no evidence that prison officials had exaggerated their response to this security problem. *Id.*

In addition to finding the rule reasonable, the Court in *Wolfish* took an approach similar to the one in *Pell, supra,* regarding the rule as a "time, place, or manner" regulation. *Id.* at 553. Thus, the rule served the important governmental interest in security; it was content-neutral; and it left available alternative means of obtaining reading material which were not shown to be burdensome or insufficient. *Id.* at 552.

In contrast, no alternative means of communicating with inmates in other institutions were available in the instant case. While phone calls to outsiders were permitted under certain conditions, *see* Tr., Vol. V at 60-64, phone calls to other inmates within the system were prohibited. *Id.* at 62. Moreover, we do not think a letter presents the same sort of "obvious security problem" as does a hardback book. Appellants concede that the primary concern with respect to mail between institutions was the possibility of making plans for escapes, riots, and the like. Appellants' Brief at 15. Yet in the daily operation of the correspondence policy now being challenged, Earl Engelbrecht, a Renz supervisor, examined, opened and scanned the contents of all mail between inmates not on his "approved" list. *Id.* at 4-5; Tr., Vol. V at 80-81, 96-97. This task, Engelbrecht testified, took approximately one hour a day. Tr., Vol. V at 70, 96-97. Under these circumstances, and considering the core First Amendment right involved, we believe that neither *Jones* nor *Wolfish* requires application of a rational basis standard to the issue of inmate-to-inmate mail.

Our own previous decisions do not change this conclusion. In *Rogers* v. *Scurr,* 676 F.2d 1211 (8th Cir. 1982), we held

that a prison regulation prohibiting the wearing of prayer caps and robes outside of religious services was reasonable. *Id.* at 1215. We noted that, although restrictions on First Amendment rights generally should be no greater than necessary to protect the governmental interest involved, prison officials must be given wide latitude when maintenance of institutional security is at issue. The plaintiff inmates, members of the Islamic faith, were permitted to congregate five times daily for prayer, were provided the pork-free diet required by their religion, and were served the special meals of the holy month of Ramadan. *Id.* at 1213. " 'So long as the prison authorities provide the inmate with a reasonable opportunity for the exercise of his religious tenents in a form that is substantially warranted by the requirements of prison safety and order, there is no violation of the inmate's constitutional rights.' " *Id.* at 1215-16 (quoting *Sweet* v. *South Carolina Department of Corrections,* 529 F.2d 854, 863 (4th Cir. 1975)). *See also Otey* v. *Best,* 680 F.2d 1231 (8th Cir. 1982) (upholding prison regulation prohibiting inmates subject to death penalty from attending worship services with general prison population; Muslim plaintiff was allowed visits by Muslim religious leader, was provided with special diet, and had access to religious literature and broadcasts).

In both *Rogers* and *Otey, supra,* the prison rules in question were essentially regulations of the time, place, or manner in which an acknowledged First Amendment right could be exercised. In both cases, the right of free exercise of religion was not completely deprived but was merely limited to the extent necessary to conform to security needs. Alternative means were provided by which the inmates could adhere to their religious tenets.

Closer in point is our recent decision in *Gregory* v. *Auger,* 768 F.2d 287 (8th Cir. 1985). There, an inmate challenged a prison regulation prohibiting the receipt of all but first class mail while an inmate was on disciplinary detention status

(DD1). Inmates were placed on DD1 status for no longer than sixty days. *Id.* at 290. The rule was designed to make DD1 status less pleasant than being out in the general prison population, so as to deter future misconduct. *Id.* We upheld the regulation because of its temporary nature and because of the need of prison officials to " 'have available sanctions that impose incremental disadvantages on those already imprisoned.' " *Id.* (quoting *Daigre* v. *Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983)). We observed that "the Reformatory could properly have established mail policies far more restrictive than this, so long as the disciplinary withholding of mail was only to be temporary." *Id.*

In the case at bar, however, the mail restrictions were neither temporary nor disciplinary. Although past misconduct was considered by the classification/treatment team in deciding whether an inmate should be "approved" for interinstitutional correspondence, it was but one of several factors. Moreover, the chairman of the team testified that decisions on inmate-to-inmate mail were usually made before they reached the classification team; inmates would stop the superintendent or a supervisor in the hallway and receive a decision on the spot. Tr., Vol. II at 148. The *Gregory* decision teaches that a prisoner mail prohibition is a serious infringement of First Amendment liberties, permissible only in narrowly circumscribed settings such as existed there.

We conclude that the exchange of inmate-to-inmate mail is not presumptively dangerous nor inherently inconsistent with legitimate penological (sic) objectives. We therefore affirm the district court's application of the *Martinez* strict scrutiny standard and its decision finding the Renz corresponding rule unconstitutional.

THE MARRIAGE RULE

Two regulations concerning marriage are at issue. Prior to December 1, 1983, the rule ("the old rule") set out the

procedure to be followed when an inmate desired to marry. The thrust of the old rule was to place responsibility for any and all preparations upon the inmate, and to make clear that any assistance from prison officials would be secondary to the normal functions of the institution. While the rule was silent as to the giving or withholding of permission to marry, Superintendent Turner testified that he believed he had the inherent power to deny permission by virtue of Missouri statutes "which allow me to control my institution." Tr., Vol. I at 70.

On December 1, 1983, a new marriage regulation ("the 1983 rule") was promulgated. Under the 1983 rule, an inmate desiring to marry had to file a written request stating reasons for the marriage. The superintendent was given authority to approve the request "when there are compelling reasons to do so," and to disapprove the request if "the wedding would pose a threat to the security and operation of the institution." While both rules appear applicable to marriages between inmates and outsiders, the record refers only to proposed marriages between two inmates.

The district court apparently assumed that the marriage rules were intended to serve the legitimate state interests in security and rehabilitation. *Safley*, 586 F.Supp. at 594. The court held the rules unconstitutional because they were "far more restrictive than is either reasonable or essential for the protection" of those interests. *Id.* (citations omitted). The court thus effectively applied the *Martinez* standard, *see Martinez*, 416 U.S. at 413, albeit without reference to that decision. As with the correspondence regulation, appellants argue the court should have applied a reasonableness standard.

It is well settled that the decision to enter into a marital relationship is a fundamental human rights. *Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535

(1942); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Appellants initially contend, however, that a prisoner has no right to have a marriage ceremony performed in prison. In support of this proposition, appellants cite us to *Johnson* v. *Rockefeller,* 365 F.Supp. 377 (S.D. N.Y.), *aff'd without opinion sub. nom., Bulter* v. *Wilson,* 415 U.S. 958 (1973); *Polmaskitch* v. *United States,* 436 F.Supp. 527 (W.D. Okla. 1977); and *Wool* v. *Hogan,* 505 F.Supp. 928 (D. Vt. 1981). We find this contention to be without merit.

Both *Johnson* and *Wool, supra,* determined that a restriction on a prisoner's right to go through the formal ceremony of marriage does not amount to an infringement on a fundamental right because those aspects of a marriage which make it a basic civil right—"cohabitation, sexual intercourse, and the begetting and raising of children"—are already precluded by the fact of incarceration. *Johnson,* 365 F.Supp. at 380; *Wool,* 505 F.Supp. at 932. This argument ignores the elements of emotional support and public acknowledgment (sic) and commitment which are central to the marital relationship. Moreover, it is contrary to the *Zablocki* Court's interpretation of the decision to marry as being distinct from, but equally as important as, decisions relating to procreation and other family matters.

> [T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. * * * [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

Zablocki, 434 U.S. at 386. In *Polmaskitch, supra,* the court first determined that it had no jurisdiction of the case, and then went on to decide that a prisoner has no fundamental right to marry while incarcerated. We need not give precedential value to a decision made without jurisdiction. Thus,

we hold that an inmate's decision to marry is a fundamental right protected by the Constitution. *See Bradbury* v. *Wainwright,* 718 F.2d 1538, 1540 (11th Cir. 1983).

Appellants' main argument is the same as that advanced in connection with the mail rule—that is, the district court applied the wrong legal test. They rely on *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977), and *Bell* v. *Wolfish,* 441 U.S. 520 (1979), as well as our own decision in *Otey* v. *Best,* 680 F.2d 1231 (8th Cir. 1982). We discussed these cases *supra* and we adhere to our earlier analysis.

All three decisions involved regulations of the time, place or manner in which a particular right could be exercised, and all three regulations left open other means of exercising that right. Thus, the union materials in *Jones* could have been mailed individually to prison inmates rather than by bulk mail. 433 U.S. at 130 n. 8. The pretrial detainees in *Wolfish* were permitted to receive all soft-covered reading materials, could receive hardback books directly from publishers, book clubs and bookstores, and had access to hardback books in the prison library. 441 U.S. at 552. And the Muslim death row inmate in *Otey,* while prohibited from attending worship services with the general prison population, was allowed religious visits and services in his cell, adherence to Islamic dietary requirements, and access to Muslim literature and broadcasts. 680 F.2d at 1232.

Here, in contrast, both the old marriage rule as it was applied by Superintendent Turner and the 1983 rule on its face absolutely prevent those inmates denied permission from getting married. There are no alternative means of exercising that right. When a government-imposed regulation "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki,* 434 U.S. at 388

(citations omitted); *see also Abdul Wali* v. *Coughlin,* 754 F.2d 1015, 1033 (2d Cir. 1985) (where official action works to deprive rather than merely limit the means of exercising a protected right, judgment of prison officials must be scrutinized under the *Martinez* standard). We therefore affirm the district court's application of strict scrutiny in evaluating the marriage rules.

THE DISTRICT COURT'S FINDINGS OF FACT

Finally, appellants contend that certain of the district court's findings of fact are clearly erroneous. Fed. R. Civ. P. 52(a). We may not overturn findings of fact unless, after a review of the entire record, we are left with the definite and firm conviction that a mistake has been committed. *Pullman-Standard* v. *Swint,* 456 U.S. 273, 284 n. 14 (1982); *Aetna Casualty & Surety Co.* v. *General Electric Co.,* 758 F.2d 319, 323 (8th Cir. 1985). As to each challenged finding, appellants concede there is supporting testimony but argue that the district court gave improper weight or significance to the finding. Having thoroughly examined the record and found substantial evidence to support each finding of fact, we hold the district court's findings are not clearly erroneous.

The thrust of appellants' argument seems to be that, even assuming the findings of fact are correct and the proper legal standard was applied, the facts of this case do not warrant the conclusion that the mail and marriage rules are unconstitutional. Since the district court based its decision on the failure of the rules to meet the least restrictive alternative requirement, we take this to be an argument that the court erred in holding that the mail and marriage rules were not the least restrictive means of serving the prison officials' objectives of security and rehabilitation.

The mail rule permitted correspondence between unrelated inmates "if the classification/treatment team of each inmate deems it in the best interest of the parties involved."

While there was testimony that the question whether correspondence between two particular inmates was in their best interests was submitted to the classification/treatment team, there was other testimony indicating that in fact the team was rarely consulted. The mail room supervisor, Engelbrecht, typically rendered a decision either at the time an inmate requested permission from him or when an inmate simply went ahead and wrote a letter which was then intercepted in the mail room and diverted to Engelbrecht. The orientation booklet given to inmates on arrival at Renz stated that no correspondence between non-family inmates was permitted, apparently in the hope that inmates would be discouraged from attempting to write.

The testimony also revealed that the principal reason for refusal of inmate-to-inmate mail was the prison officials' belief that female inmates should avoid any personal relationships, friendly or romantic, with male inmates. Such relationships are detrimental to the women's rehabilitation, according to Superintendent Turner, because they may find themselves the victims of abuse which, presumably, may in turn lead them back to criminal activities. Additionally, mail was refused on the ground of security on the theory that it may contain plans for escape, violent uprisings or other illegal activities. Marriages were denied on the basis of the same protective concerns, as well as the belief that possible "love triangles" would generate violent confrontations between inmates. No specific incident of the realization of any of these concerns, involving these or any other inmates, was alleged or shown.

We agree with the district court that stopping mail and preventing marriages are not the least restrictive means of achieving these objectives. With respect to rehabilitation, efforts such as counseling, teaching of job skills to promote independence, or development of outside interests to increase the inmate's self-image and self-respect would certainly be

permissible ways to help an inmate avoid detrimental relationships without impinging on the right to exchange letters with another or the right to marry. In our view, without strong evidence that the relationship in question is or will be abusive, the connection between permitting the desired correspondence or marriage and the subsequent commission of a crime caused thereby is simply too tenuous to justify denial of those constitutionally protected rights. As to the security concerns, we think the prison officials' authority to open and read all prisoner mail is sufficient to meet the problem of illegal conspiracies. As we discussed earlier, appropriate time, place or manner regulations are also permissible. And the development of violent "love triangles" is as likely to occur without a formal marriage ceremony as with one. Refusing to permit a wedding would not necessarily prevent such confrontations.

CONCLUSION

In sum, we affirm the district court's use of strict scrutiny in evaluating the constitutionality of the inmate correspondence and marriage regulations, we hold the court's findings were not clearly erroneous, and we uphold the court's conclusion that the regulations in question are unconstitutional.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

Leonard SAFLEY, et al., and Mary Webb, et al., individually and as a class of similarly situated people, Plaintiffs,

v.

William R. TURNER, et al., and David Blackwell, et al., Defendants.

Nos. 81-0891-CV-W-6, 82-0072-CV-W-6.

United States District Court,
W.D. Missouri, W.D.

May 7, 1984.

In class action to determine constitutional status of inmate-to-inmate correspondence, visitation privileges relating to former inmates and right to marry, the District Court, Sachs, J., held that: (1) marriage and decision to enter into marital relationship involve fundamental human rights; (2) prison regulations and practices against inmate-to-inmate correspondence were unnecessarily sweeping; (3) mail censorship regulations and practices failed to provide minimum constitutional procedural safeguards against arbitrary and capricious censorship, in violation of inmates' First Amendment rights; (4) rule prohibiting former inmates from visiting prison until after they had been in nonprison setting for six months was legitimate exercise of discretion; and (5) all issues presented were sufficiently novel or unsettled so that good-faith defense could be recognized in claims of two plaintiffs against individual defendant.

Floyd R. Finch, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo., for plaintiffs.

Henry Herschel, Asst. Atty. Gen., Jefferson City, Mo., for defendants.

MEMORANDUM OPINION AND ORDER

SACHS, District Judge.

FINDINGS OF FACT

1. The Renz Correctional Institution (hereinafter "Renz") contains male and female prisoners. Most of the female inmates located at Renz are medium and maximum security level offenders. Some of the male inmate need special protection from other prisoners in Missouri penal institutions.

2. A class action has been certified to determine the constitutional status of inmate-to-inmate correspondence, visitation privileges relating to former inmates, and the right to marry. The focus of inquiry is the Renz institution, but the rights in issue are not restricted to Renz.

3. Renz has a minimum security perimeter without the added security elements, such as guard towers or walls that other maximum security units would possess. The other security institutions within the Missouri Correctional System have varying differences in perimeters, in population, and in security procedures and facilities.

4. Correspondence between inmates is supposedly regulated by divisional regulation 20-118.010(e):

> Correspondence with immediate family members or inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/treatment team of each inmate deems it in the best interests of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

5. There have been instances where the divisional correspondence regulation has been violated. For example:

a. Letters have been stopped without notice or explanation to either the correspondent or the recipient;

b. Mail to and from persons not incarcerated has been stopped or refused on factually incorrect grounds or without legitimate justification;

c. Mail to incarcerated family members has been refused or returned without notification or explanation;

d. Mail with former inmates has been refused or returned without notification or explanation.

6. The provisions of the divisional correspondence regulation allowing the classification/treatment team of each inmate to prohibit inmate-to-inmate correspondence have not been followed at Renz. Theoretically the classification/treatment team uses psychological reports, conduct violations, and progress reports in deciding whether to permit correspondence. At Renz, however, the rule as practiced is that inmates may not write non-family inmates or receive mail from non-family inmates. The more restrictive practice is set forth in the Renz Inmate Orientation Booklet presented to each inmate upon arrival at Renz. The restrictive rule at Renz is commonly known throughout the Missouri Correctional System.

7. The Renz rule against inmate-to-inmate correspondence is enforced without a determination that the security or order of Renz or the rehabilitation of the inmate would be harmed by allowing the particular correspondence to proceed and without a determination that there is no less restrictive alternative to resolve any legitimate concerns of the Department of Corrections short of prohibiting all correspondence.

8. Inmates at most institutions in the Missouri Correctional System are permitted to correspond with inmates in most other institutions. The great restriction on inmate correspondence is practiced at Renz.

9. While there is no regulation that prohibits inmates from corresponding with persons who are not incarcerated, on at least one occasion outgoing mail to a non-incarcerated

person was returned to the inmate and delivery refused because of derogatory remarks made about prison staff members.

10. Correspondence between inmates has been denied solely on the basis of the inmate's marital status.

11. Under an unwritten rule at Renz, prior approval is required before an inmate may write to another inmate regarding legal matters. Absent this approval, inmate-to-inmate legal mail routinely is opened, stopped, and refused in violation of the Department of Corrections' written rule.

12. The Division of Corrections maintains a computer listing of each inmate's potential enemies. This listing is available to all correctional officials and accompanies the inmate on transfers from institution to institution.

13. Correspondence between inmates has been denied despite evidence that the correspondence was desired simply to maintain wholesome friendships.

14. The staff at Renz has been able to scan and control outgoing and incoming mail, including inmate-to-inmate correspondence.

15. Prior to December of 1983, the Division of Corrections operated under an inmate marriage rule, designated 20.117.050, which (a) did not obligate the Missouri Division of Correction to assist an inmate who wanted to get married, but (b) did not authorize the superintendents of the various institutions to prohibit inmates from getting married. Inmates at Renz were, however, frequently denied permission to be married.

16. On December 1, 1983, after this litigation was filed, the Division of Corrections promulgated a new regulation which placed a burden upon the inmate to provide the institution with a compelling reason to permit an inmate marriage while the inmate is incarcerated.

17. At Renz female inmates have been refused permission to marry on several occasions on the unexplained

ground that the proposed marriage was not in their "best interest," in the opinion of the superintendent. Marriage requests also have been denied because of an inmate's prior history of relationships with men.

18. Inmates in correctional institutions other than Renz and the Chillicothe Correctional Center (for women) routinely are allowed to be married upon request, assuming they otherwise satisfy Missouri's statutory requirements for marriage. Restrictions are exercised most strictly at Renz and Chillicothe. The restrictions applicable to female inmates are apparently generally motivated by "protective" attitudes.

19. The marriage of a number of inmates has been delayed or forbidden because of the pendency of this lawsuit. While this practice may have been unwisely sanctioned by defendants' prior counsel, it has the appearance of penalizing the inmate population because some inmates have chosen to litigate.

20. The current inmate marriage rule places an unreasonable burden upon the inmate to prove that there are "compelling" reasons for the marriage. The term "compelling" is not defined. Defendants, however, suggest that a reason for marriage normally would not be considered compelling unless the relationship had resulted in a pregnancy or an illegitimate child prior to the request.

21. Inmates have been informed that Renz does not permit marriages.

22. There is regular transportation between most of the correctional facilities within the Missouri System for medical, dental and transfer reasons and to transport nursing aides from Renz to the Missouri State Penitentiary. Inmates also travel for court appearances. Defendants have been able to successfully handle the security problems.

23. Renz has a regulation prohibiting visitation by former inmates for a period of six months. Regulation 618.020-(5)(D) provides that:

[t]he existence of a criminal record does not constitute a barrier to visiting privileges. Each proposed visitor shall be considered individually by the casework staff and superintendent after six (6) months on release status. Individuals on parole status and conditional release desiring to visit residents of the institution must have written approval by the parole officer prior to final decision on [sic] the casework staff and the superintendent.

24. Visitation of prisoners by former inmates is permitted after they have been in a non-prison setting for six months. While the six month period admittedly is arbitrary, in the sense that five or seven months would serve the same interest, it is based partly on the security interest of the institution and partly on the belief that it is in the best rehabilitative interest of the inmate to sever ties with the prison environment for a period of time.

25. After the six month period has passed, the former inmate is then approved or disapproved in the same manner and by the same criteria as would be applied to any other prospective visitor to the institution.

26. All visitors must be approved by a review of a written application. Unapproved visitors are not permitted entrance to Renz except under exceptional circumstances.

27. Visitation by former inmates for the purpose of attending religious meeting or self-help meetings such as Alcoholics Anonymous have been denied because of the absolute, non-discretionary application of the six month non-visitation rule.

28. Inmates have not been informed of their right to participate in a team with correctional officials in making decisions concerning the inmate's status. The "team concept" has not been described to inmates; the inmates have not been informed of their right to participate in decision-making other than as applicants.

29. Inmates have been occasionally threatened with the loss of writing privileges and visitation privileges with family members for attempting to exercise their correspondence and marriage rights.

30. Inmates have occasionally been threatened with the loss of parole and of parole privileges for attempting to exercise their marriage, correspondence, and visitation rights.

31. Inmates have occasionally been harassed and threatened if they pursue grievances in an attempt to exercise their correspondence and marriage rights.

32. Inmates have occasionally been threatened with the loss of custody of their children if they pursue their marriage rights.

33. Several of the plaintiffs and their witnesses are reasonably concerned that their testimony has made them the subject of retaliation or harassment by employees of the Department of Corrections.

34. Insofar as marriage, correspondence, and visitation are concerned the grievance process has had little, if any, effect upon a superintendent's decision. In actual practice, when an inmate writes a letter of complaint to the Director of the Division of Correction, the Director's response is written by the superintendent whose decision is the subject of complaint. When a grievance is taken to the Director, the Director's staff prepares the response without contacting the inmate, based upon information provided by the inmate's superintendent and his staff.

35. The grievance process has been occasionally interfered with by Superintendent Turner.

36. Len Safley met P.J. Watson (a female inmate) at Renz where they became friends.

37. Safley and Watson were familiar with an unwritten policy followed by Renz whereby if any male and female

inmate developed a close relationship or a physical relationship one of the two inmates would be transferred ("rolled") to another institution.

38. Shortly after a relationship between Safley and Watson had developed, and after an incident that may now be described as a noisy "lovers' quarrel," Safley was transferred to the Ozark Correctional Center at Fordland, Missouri.

39. Correspondence between Safley and Watson was denied for the reason that it was not in Watson's best interests. After Safley was transferred to the Tipton Pre-Release Center, Renz continued to refuse correspondence from Safley to Watson. The same was true after he was transferred to the Kansas City Honor Center.

40. In order to correspond with Watson, Safley opened a post office box and used a pseudonym, "Jack King." Some of the letters were received by Watson, but others were returned to "Jack King."

41. Various letters and cards mailed to Watson from Safley's mother were refused by Renz, apparently because the letter contained Safley's name or a message such as "Len sends his love."

42. Safley asked friends at the Kansas City Honor Center to write to Watson using their home addresses or post office box. All of the letters were returned, apparently for the reason that they contained greetings from Safley.

43. Watson did not receive notification that letters to her from Safley, his mother, or his friends were being returned.

44. Safley received weekend passes at the Kansas City Honor Center. He had permission from the staff of the Kansas City Honor Center to travel to Jefferson City to visit Watson. Renz denied Safley permission to visit Watson.

45. After this litigation was filed, on the occasion of a hearing for a preliminary injunction, Safley obtained a marriage license and, being accompanied by an officiating min-

ister, was permitted by the court to marry, thereby mooting the issue presented for hearing.[1]

Various additional factual issues will be referred to in the following section of this opinion, where pertinent to legal rulings.

CONCLUSIONS OF LAW

Marriage.

[1] Marriage and the decision to enter into a marital relationship involve fundamental human rights. *See Zablocki* v. *Redhail,* 434 U.S. 374, 386, 98 S.Ct. 673, 681, 54 L.Ed.2d 618 (1978). Nevertheless, "the right to marry is not unfettered." *Bradbury* v. *Wainwright,* 718 F.2d 1538, 1540 (11th Cir. 1983). While the Supreme Court has held " '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,' " it has also held that "prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell* v.

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[1]It is generally the practice of the court to encourage informal disposition of controversies. The court took into account the fact that the individuals were temporarily in federal custody, the hearing was sought in good faith, and the marriage was in compliance with Missouri law. If the court had recognized a substantial state interest in preventing the marriage, permission would, of course, have been denied. No such interest was, or has been, presented.

[2]The court is aware that model standards for prison administration would certainly not determine "the constitutional minima' ". *Rhodes* v. *Chapman,* 452 U.S. 337, 348 n. 13, 101 S.Ct. 2392, 2400 n. 13, 69 L.Ed.2d 59 (1981). Such standards may, however, be "helpful and relevant with respect to some questions." *Id.* It will be assumed that a responsible committee formulating standards would be sensitive to security interests, prisoner needs and legal issues. The problem with placing total reliance on the views of prison administrators would be their natural inclination to form opinions based on convenience, conceivable though remote security interests, financial considerations and the like. While giving due deference to such testimony, the court has an inescapable duty of striking a constitutional balance.

Wolfish, 441 U.S. 520, 545-46, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979) (quoting *Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 443 U.S. 119, 125, 97 S.Ct. 2532, 2537, 53 L.Ed.2d 629 (1977). Moreover, "[t]here must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.' " *Id.* at 546, 99 S.Ct. at 1877 (quoting *Wolff* v. *McDonnell,* 418 U.S. 539, 556, 94 St.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974)).

[2] The Missouri Division of Corrections' inmate marriage rule inconstitutionally infringes upon plaintiffs' right to marriage because it is far more restrictive than is either reasonable or essential for the protection of any state security interest, or any other legitimate interest, such as rehabilitation of inmates. *See Bradbury* v. *Wainwright,* 718 F.2d 1538 (11th Cir.1983); *Lockert* v. *Faulkner,* 574 F.Supp. 606 (N.D.Ind.1983); *Salisbury* v. *List,* 501 F.Supp. 105 (D.Nev. 1980); ABA Standard for Criminal Justice 23-8.6(a)(i) (2d ed. 1980).[2] The court disagrees with one recent decision, *Wool* v. *Hogan,* 505 F.Supp. 928 (D.Vt.1981). Chief Judge Sharp in *Lockert* adequately responds to the thrust of the *Wool* decision in his comments about the significance of marriage, even apart from the consortium aspects.

While marriage counseling may well be an important service provided by prison authorities, defendants have no right to have the last word on a personal decision of this import. Even inmates have the right to make their own mistakes.

Correspondence.

[3, 4] The court recognizes the legitimate governmental interest in the order and security of penal institutions which "justifies the imposition of certain restraints on inmate correspondence." *Procunier* v. *Martinez,* 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d (1974). Such restriants must meet two criteria before the censorship will be upheld:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

Id. at 413-14, 94 S.Ct. at 1811. *See also* ABA Standard for Criminal Justice 23-6.1(a) (2d ed. 1980).

In the leading decision regarding the correspondence rights of prisoners the Supreme Court pointedly refrained from ruling on inmate-to-inmate correspondence. *Procunier* v. *Martinez,* 416 U.S. at 408, 94 S.Ct. at 1808 (1974). A slightly earlier Fifth Circuit decision sustained a federal policy prohibiting such a correspondence except for "members of the immediate family" and "special exceptions" sanctioned by a caseworker. *Heft* v. *Carlson,* 489 F.2d 268 (5th Cir.1973).

It has been stated that the cases have "uniformly upheld the right of prison officials to restrict inmate to inmate correspondence." *Schlobohm* v. *U.S. Atty. Gen.,* 479 F.Supp. 401, 403 (M.D.Pa.1979). There is, however, no recent appellate ruling to that effect.

An Eighth Circuit decision declines to rule that there is an "unqualified right" to forbid inmate-to-inmate correspondence. *Watts* v. *Brewer,* 588 F.2d 646, 650 (8th Cir.1978). Only a prohibition against "secret" correspondence was sustained in *Watts,* particularly because of the danger such secret and

unregulated correspondence would pose to prisoners who have been protectively isolated in another prison. A Fifth Circuit decision subsequent to *Martinez* requires careful examination of First Amendment rights of prisoners to communicate between a segregation unit and the less secure areas of a prison. *Rudolph* v. *Locke,* 594 F.2d 1076 (5th Cir.1979). A bare assertion of security interests is "not enough." 1077. *See also Stevens* v. *Ralston,* 674 F.2d 759 (8th Cir.1982) (security claims not deemed automatically controlling in justifying prohibition of correspondence between an inmate and a former prison employee).

[5] Defendants may attempt to distinguish *Rudolph* because it refers to certain highly protected subjects of communication ("literature about politics and religion") and because the communication was within a single institution rather than between institutions. Neither of these distinctions seems controlling. A segregated unit would be entitled to the highest degree of permissible security. The subject matter of communication rarely governs its protection. In accordance with *Rudolph,* and contrary to *Heft,* the court believes that the only valid constitutional rule would permit most inmate-to-inmate communications, with appropriate regulations as to openness (under the *Watts* rule) and surveillance. Double surveillance (reading at both institutions) would generally seem sufficient.

The Court notes that defendants have allowed inmates the unrestricted use of long distance telephones, apparently without surveillance. This would seem to present a security risk exceeding that here involved. Defendants' expert witness from Kansas, Sally Chandler Halford, acknowledged that, contrary to her views, Kansas permits inmate-to-inmate correspondence. While such communication is somewhat burdensome to the authorities, no pattern of security problems was developed by the witness or by other testimony. Forbidding *all* correspondence would reduce administrative burdens, but a First Amendment violation would result.

[6, 7] Even if some restriction on inmate-to-inmate correspondence can be justified, the regulations and practices at bar must fall. The prohibitions are unnecessarily sweeping. Correspondence is a sufficiently protected right that it cannot be cut off simply because the recipient is in another prison, and the inmates cannot demonstrate special cause for the correspondence. Communication, like marriage, is one of the basic human rights and should be preserved subject to whatever restrictions or surveillance is appropriate to avoid the planning of escapes, threats to inmates, criminal activity or other potential harm that may be reasonably articulated by the authorities.

[8] The mail censorship regulations and practices have been applied in an arbitrary and capricious manner infringing upon the plaintiffs' First Amendment rights. The regulations and practices fail to provide for the minimum constitutional procedural safeguards against arbitrary and capricious censorship. *Procunier* v. *Martinez,* 418 U.S. at 417-18, 94 S.Ct. at 1814.

Defendants have failed to demonstrate that the needs of Renz are sufficiently different to justify greater censorship than is applied by other well-run institutions. *See id.* 418 U.S. at 414-18 nn. 14 & 15, 94 S.Ct. at 1811-14 nn. 14 & 15; 28 C.F.R. §§ 540.10-540.22 (1982).

The court recognizes that occasional mishandling of correspondence is inevitable, and that inmate-to-inmate correspondence may have some risks slightly exceeding that of ordinary correspondence, but concludes that the institution can effectively cope with the problems through less restrictive means, such as increase scanning of the mail of potentially troublesome inmates. *Cf. United States* v. *Mills,* 704 F.2d 1553, 1560 (11th Cir.1983); *Jensen* v. *Klecker,* 648 F.2d 1179, 1182 (8th Cir.1981); *Laaman* v. *Helgemoe,* 437 F.Supp. 269, 323 (D.N.H.1977).

Visitation.

[9, 10] The court will uphold the six month visitation rule, as a matter of legitimate discretion. The rule prohibiting former inmates from visiting a prison until after they have been in a non-prison setting for six months appears to be rationally related to a proper rehabilitative interest. It does not impinge on any rights sufficiently to be ruled invalid. Inmates have no absolute constitutional right to unrestricted visitation. *See McMurry* v. *Phelps,* 533 F.Supp. 742, 764 (W.D.La.1982); *Fennell* v. *Carlson,* 466 F.Supp. 56, 58 (W.D.Okla.1978); *Laaman* v. *Helgemoe,* 437 F.Supp. at 320; *Hamilton* v. *Saxbe,* 428 F.Supp. 1101, 1110-12 (N.D.Ga.1976), *aff'd sub nom., Hamil-ton* v. *Bell,* 551 F.2d 1056, (5th Cir.1977) (per curiam).

The evidence shows that exceptions to the rule should doubtless be made, as in the case of a former inmate who wished to help in the Alcoholics Anonymous program.[3] Where there is a significant personal relationship between a present inmate and a former inmate that is not antisocial in nature, or where visitation would not tend to delay rehabilitation of the released prisoner, exceptions to the six month rule seem desirable, but will not be mandated as a matter of constitutional law.

Damages.

[11] All of the issues presented to the court are sufficiently novel or unsettled so that a good faith defense may be recognized in the claims of plaintiff Safley and Watson against the individual defendants. *See Procunier* v. *Navarette,* 434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978). While there is some evidence from which a spiteful attitude could be inferred, it is sufficiently speculative so that the individual defendants should be given the benefit of the doubt. They appear to have been carrying out their concept of

[3]Defendants' expert, Ellis McDougal, testified that he favored exceptions of this sort.

what was best for inmates Safley and Watson. Superintendent Turner's attitude did not evidence hostility. On the contrary it seemed excessively paternalistic.

[12] Even if a good faith defense were not recognized in this case, the thrust of the Safley-Watson claim is for injunctive relief, and under all the facts they should be restricted to nominal damages. *Hunter* v. *Auger,* 672 F.2d 668, 677 (8th Cir.1982). Plaintiffs have achieved their objective, and have not been subjected to harms exceeding the violation of privacy involved in the *Hunter* case.

Relief.

For all of the above reasons it is hereby

ORDERED that counsel for plaintiffs and defendants confer, negotiate and prepare a suitable decree in accordance with this opinion. The joint or several proposals of the parties should be submitted to the court within thirty days of the date of this order. It is further

ORDERED that the Safley-Watson damage claims are DENIED. It is further

ORDERED that plaintiffs' counsel, having generally prevailed on the merits of this cause, promptly submit his claim for attorneys' fees and expenses. It is further

ORDERED that defendants engage in no harassment of inmates for their participation in this lawsuit.